In the Privy Council.

No. 122 of 1925.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION.)

BETWEEN

WILLIAM ROBINS (*Plaintiff*) - - - - - *Appellant*

AND

NATIONAL TRUST COMPANY LIMITED, Executors of the estate of Edward Chandler Walker; ~~STEPHEN A. GRIGGS, Executor of the estate of Mrs. Stephen Griggs; THE CHURCHWARDENS OF ST. MARY'S CHURCH, Walkerville; THE BOARD OF GOVERNORS OF THE UNIVERSITY OF TORONTO; THE BOARD OF GOVERNORS OF ST. ANDREW'S COLLEGE, Toronto;~~ THE TRUSTEES OF HOTEL DIEU, Windsor; ~~THE CHURCHWARDENS OF ALL SAINTS' CHURCH, Windsor; STEPHEN A. GRIGGS; NATIONAL TRUST COMPANY, LIMITED, Administrators of the estate of Franklin Hiram Walker; HARRINGTON E. WALKER; HIRAM H. WALKER; F. CALDWELL WALKER and NATIONAL TRUST COMPANY, LIMITED, Executors of the estate of James Harrington Walker; EDWARD CHANDLER FARRINGTON; ELIZABETH BUHL; MAY WALKER; MARGARET WALKER; ARTHUR H. BUHL and DETROIT TRUST COMPANY, the last two named as executors of the estate of Willis H. Buhl; ARTHUR H. BUHL; LAWRENCE D. BUHL; ELIZABETH BUHL SHELDON; F. CALDWELL WALKER; MARY MARGARET SMALL; JENNIE WILLIAMS; LUCY FARRINGTON; BOARD OF DIRECTORS OF THE DETROIT ART~~

CASE FOR RESPONDENTS,
NATIONAL TRUST CO., LTD.

S.L.S.S., Ltd.—WL5227.

~~MUSEUM; EDWARD LOTHROP WARNER; EDWARD WALKER ELLIOTT; ELIZABETH TALMAN WALKER; HARRINGTON E. WALKER; HIRAM H. WALKER; MRS. JAMES CAMPBELL; SUSIE JENNEY; ALICE HOFFE;~~ MARY GRIFFIN WALKER; LILLIE BREWSTER; MARY W. CASSELL; ~~COUNTESS ELLA MATUSCHKA~~ (*Defendants*) - *Respondents.*

CASE OF THE RESPONDENT

NATIONAL TRUST COMPANY LIMITED, Executor of the Estate of Edward Chandler Walker.

Record.

p. 613. **1.** This is an appeal from the judgment dated 3rd day of April, 1925, of the Second Appellate Division of the Supreme Court of Ontario, affirming p. 595. the judgment dated the 23rd day of May, 1924, of the Supreme Court of Ontario (Mowat, J.) delivered at the trial of this action without a jury.

2. In this action, which was commenced on the 23rd June, 1923, against the Respondent, National Trust Company Limited, Executor of the Estate of Edward Chandler Walker, the Appellant sought to set aside the Exhibit 5, p. 627. last Will and Testament dated the 27th February, 1914, of Edward Chandler Exhibit 5, p. 739. Walker who died on the 11th March, 1915, and the Probate thereof granted to the said Respondent by the Surrogate Court of the County of Essex on the 11th September, 1915, on the grounds of mental incapacity and undue Exhibit 2, p. 615. influence and to establish a former Will dated the 21st December, 1901.

3. The Appellant was not in any way related to the testator, but for many years prior to 1912 he had been employed by Hiram Walker & Sons Limited, a Company controlled and substantially owned by the testator and his brothers, and amongst other provisions in the Will dated 21st p. 616, ll. 3-6. December 1901, the testator had appointed the Appellant one of four p. 621, ll. 37-39. Executors and Trustees and had directed his Trustees to transfer to the Appellant $100,000 par value of the capital stock of Hiram Walker & Sons Limited (viz.: 1,000 shares, par value $100.00 each).

Exhibit 3, p. 626. **4.** By Codicil dated November 1913, the Respondent National Trust Company Limited was appointed Executor and Trustee instead of the Executors and Trustees appointed under the Will dated 21st December p. 627, ll. 19-20. 1901, and by the testator's last Will dated 27th February 1914, all earlier Wills were revoked.

5. By Order dated 20th November 1923, certain other defendants were added, but of these only the Respondents, Mary G. Walker (the widow of the testator), Elizabeth Brewster, Mary W. Cassell, and the Trustees of the Hotel Dieu, were represented at the trial. p. 6. p. 13.

6. The Appellant's action was dismissed with costs, and he thereupon appealed to the Second Divisional Court upon the grounds :— p. 596.

(1) That the judgment was contrary to law and to the evidence and the weight of evidence ;

(2) That the evidence adduced by the Appellant cast the onus upon the Respondents to prove that at the time of making the Will dated 27th February 1914, the testator was of sound mind, and that the Respondents had not discharged that onus ;

(3) That the learned Trial Judge had improperly admitted evidence ; and

(4) That in the alternative, there should be a new trial upon the grounds—

Firstly—That the learned Trial Judge wrongfully admitted the evidence of Mrs. Mary G. Walker ; and

Secondly—That the learned Trial Judge wrongfully permitted the Respondents to give evidence of more than three persons who expressed opinions as to the mental capacity of the testator to make a Will or transact business contrary to the provisions of the Evidence Act, Revised Statutes of Ontario, Chapter 76, Section 10.

Upon the argument of the appeal the Appellant also asked for a new trial on the ground of the alleged discovery, since the trial, of new evidence. p. 598, l. 27.

7. The Appellate Division dismissed the appeal without calling upon counsel for the Respondent for the reasons stated in the judgment of Mr. Justice Orde who delivered the judgment of the Court. pp. 598, *et seq.*

8. The issue upon this appeal is whether the Appellant is entitled to the relief claimed by him. p. 34, l. 15.

THE FOLLOWING FACTS RELATING TO THE TESTATOR ARE DISCLOSED BY THE EVIDENCE.

9. The Testator was born in 1851, and he was therefore 63 years of age at the time of making the Will in question, and was 64 years of age at the date of his death. p. 93, ll. 8-16.

He was described in the evidence as quiet, reticent, reserved, self-contained, a man of few words, thoughtful, deliberate and slow of speech, but considerate, courteous and dignified, slow in coming to a conclusion p. 26. p. 28, ll. 18-20. p. 52, ll. 10-16. p. 305, ll. 5-30. p. 307, ll. 8-20.

p. 489, ll. 26-44. p. 490. p. 526, ll. 29-43. p. 17, l. 25. p. 510, l. 12.

but not apt to change when he had done so, charitable, public spirited, greatly interested in Art, with considerable knowledge on the subject, and a purchaser of paintings on a considerable scale; a perfect gentleman by nature. He had never been a robust man, and during the latter part of his life he suffered from a prolapse of the bowel which occasioned, at intervals, great discomfort and some pain and he was also somewhat affected by Arterio-Sclerosis.

p. 93, ll. 11-22.

10. The Testator's father, the late Hiram Walker, and his three sons, the Testator, who was the eldest, Franklin (Frank) H. Walker, and J. Harrington (Harry) Walker, had for many years carried on in partnership a distillery business at Walkerville, Ontario. They had become interested in many other business ventures, but the distillery was the most important.

p. 93, l. 27.

11. The distillery business was incorporated in 1890 under the name of Hiram Walker & Sons Limited, and after the death of Mr. Hiram Walker the three brothers controlled and substantially owned the company. Their relations were very close, and their shares in the distillery company, and in many other investments, were held by a partnership firm of Walker Sons, of which the three brothers were partners.

p. 137, ll. 9-12.

p. 93, l. 10. p. 94, l. 12.

12. The Appellant entered the employment of the firm in 1888 and after the incorporation of the Company he became Secretary and undoubtedly occupied a position of considerable authority under the Testator and his brothers, although the Appellant himself appears to have held somewhat exaggerated views as to his position and importance.

p. 136, ll. 24-38. Exhibit 16, p. 641, l. 18 to p. 642, l. 23.

13. The Appellant was on intimate terms, socially as well as in connection with business matters, with the Testator, and also, though not to the same extent, with the other two brothers. His services were undoubtedly valuable, and his salary was increased at various times from $7,500 per annum in 1891 to $15,000 per annum in 1897, but in 1898 he also received by way of additional remuneration or bonus $25,000 par value of the capital stock of the Company, and in 1905 he received a further bonus of $75,000 par value of the capital stock of the Company.

Exhibit 16, p. 642, ll. 5-15. p. 137, l. 37. p. 138, ll. 1-3. p. 154, ll. 1-26. p. 137, l. 29.

In the year 1906, an arrangement was made by which he was employed for a term of five years, ending 31st August 1911, and in addition to his salary, he received further remuneration by way of commission on profits. The Appellant says this arrangement " was verbally renewed indefinitely " with Mr. Frank Walker, and definitely as to the remuneration for the " current year, for the one year." The Walkers took the position that it terminated on the 31st August 1912. During the last six years of his employment the Appellant's remuneration averaged $34,311.00 per annum, in addition to the capital stock ($100,000 par value) which he had previously received.

14. The Appellant's relations with the two brothers of the testator were also pleasant, except that from about 1900 there were a number of occasions in which the Appellant resented remarks made by the testator's brother, Franklin H. Walker, who appears to have been somewhat more brusque and aggressive than the other two brothers. On each of these occasions " offences," as he insists upon calling them, the Appellant's line was to threaten resignation and the matter was settled as he says by an apology from Franklin H. Walker. It appears that the Appellant at times resented any failure to accept his suggestions on the part of the owners of the business, whom he felt were not so fully informed or competent to judge as he was, and he adopted the practice of discussing matters in advance with the testator and Harrington Walker, thus committing them to the course which he desired, and he then expected them to overrule any dissent from their brother Franklin H. Walker, and the Appellant seems to have felt that he had such an assurance from the other two that he could rely upon their forcing Franklin H. Walker out of the business in case of any future disagreement.

p. 129, l. 35. p. 130, ll. 29-40. p. 136, ll. 9-15. p. 147, l. 26. p. 186, l. 28 to p. 187, ll. 1-23. pp. 148-149.

15. On the last occasion on which Mr. Franklin H. Walker offended him the Appellant thought he had received an assurance that in case of repetition Franklin H. Walker should be put out of the business, but he had evidently overplayed his hand and in 1912 the three brothers determined not to re-engage the Appellant after the expiration, on the 31st August 1912, of the year for which his term of employment had been renewed. The Appellant was apparently surprised by this decision and sought to reverse it. It may be noted that the decision was deferred until the return of the testator who had been absent. After a very long negotiation extending from June to October 1912, a settlement was arranged by which the Walkers purchased the Appellant's shares in the distillery company, and paid the Appellant $300,000 for his shares and in full satisfaction of all his claims.

pp. 148-149. p. 136, l. 46. to p. 137, l. 1. p. 136, l. 46. p. 155, ll. 1-16. p. 222, l. 10.

The circumstances in connection with this negotiation are detailed in the correspondence, Exhibits 20 and 30, and in the cross-examination of the Appellant, and will be referred to later.

pp. 154-230.

16. After this settlement, the relations of the Appellant with the Testator and his two brothers apparently ceased. The Appellant admits that the Testator held aloof from the Appellant and they never again spoke to one another, though both were living for some months thereafter in the small town of Walkerville, and " frequently " seeing each other, though in another answer the Appellant says the period when they were both in Walkerville at the same time was very short, and in another place he says it was six or seven times.

p. 227, l. 25. p. 226, l. 30 to p. 228, l. 15.

The Testamentary Capacity of the Testator and the Circumstances in Connection with the Making of the Will in Question.

17. The Appellant pleaded that the Testator was of unsound mind, and offered evidence in an attempt to prove this allegation, but upon the appeal to the Appellate Division he somewhat shifted his ground and argued that the evidence adduced cast the onus on the Respondent to prove the testamentary capacity of the Testator.

18. The witnesses called by the Appellant as to the capacity of the testator were Dr. Hoare, who had attended the testator professionally up to July 1907, and had never seen him after 1909; Dr. Dewar, who had attended him from 1910 or 1911 to November 1913, but had been called to treat him only for the prolapse of the bowel, and saw him very infrequently at intervals of some months and in cases "of rather an emergency," when he was suffering more or less discomfort or pain, and only when he was at his worst, and who had not known him before; and Dr. Shurley, of Detroit, who attended him from November 1913 until his death; Byrne, a butler, who spoke of the testator's physical ailments but had, of course, not carried on any conversation with him, and Gilbert, a valet.

p. 24, l. 38.
p. 25, l. 4.
p. 38, ll. 1-7.
p. 40, l. 29.
p. 46, l. 37.
p. 38, l. 34.
p. 46, ll. 30-35.
p. 45, l. 28.
p. 51, l. 6.
p. 45, l. 43.
p. 56, l. 38.
p. 63, l. 29.
p. 86.
p. 256.

The Appellant himself referred to indications of failing capacity up to 1912, and to his previous close friendship with the testator.

pp. 98, 99.
pp. 115, 116.

19. Dr. Hoare had treated the testator for a "specific infection" as early as 1893, and referred to ten or twelve attacks of aphasia in two or three years from 1905 to 1907, accompanied by dizziness and a good deal of mental confusion during attacks. He admitted that the testator was attending to his ordinary business during the period when he knew him, but he said that the condition described by Dr. Shurley was the logical outcome of the testator's physical condition as he knew it when he last attended him. Dr. Shurley, however, nowhere refers to the alleged specific infection and presumably did not observe it or anything which he attributed to it.

p. 18, l. 20.
p. 18, ll. 35-45.
p. 19, ll. 30-35.
p. 25, ll. 37-40.
p. 24, l. 21.

20. Dr. Dewar says that he saw the testator with an attack of aphasia, when he was very mixed in his conversation, but he illustrates this by saying that the testator would start a conversation, and that Mrs. Walker would finish it, but he admits that she was "fairly talkative," and he does not suggest that the Testator had not intelligently commenced the conversation. He was asked to look at the Will in question, and expressed the opinion that the Testator would not be capable of making the Will himself, but he says that if the changes from the old Will had been taken up clause by clause and explained, he might in his good moments have comprehended it. He did not treat the Testator for the alleged specific infection.

p. 39, ll. 36-40.
p. 40, ll. 1-10.
p. 47, ll. 1-10.
p. 47, ll. 1-10.
p. 48, l 9.
p. 50, l. 11.

21. Dr. Shurley was called to attend the Testator in consequence of an attack of grippe. He apparently did not diagnose the alleged specific infection referred to by Dr. Hoare as he does not mention it. He did not remember a "definite diagnosis of any one particular thing" but found the Testator as he says suffering from "senile debility and senility from various arterial sclerotic changes" "senile decay" and "general senile debility." He was not cross-examined as to the specific infection because this was not suggested until Dr. Hoare was called at the trial after Dr. Shurley's evidence had already been taken. He says that the Testator "was very largely like a vegetable part of the time," and refers to his slowness of speech and of thinking; he says that the Testator was in bed most of the time and having trouble with his bowels; that Mrs. Walker and the nurse "did all the conversation"; that she knew the condition of the Testator, and the "Testator could not describe much about himself that was worth while." On the other hand, Dr. Shurley did not know the patient before. He did not know that he was reticent, reserved or silent, and could not say that there was anything unusual about his attitude, and when pressed for an illustration indicating that the Testator "would not know what you were talking about" he only refers to the fact that if the patient were asked if his bowels moved, his wife would reply. He says that he was treated like a child, but the only illustration of this which apparently occurred to him was that the Testator would let his wife decide when he was asked whether he would have something to eat, or take medicine, or have his bowels moved.

p. 64, l. 4.
p. 69, l. 21.
p. 69, l. 43.
p. 66, l. 31.
p. 64, l. 10.
p. 68, l. 40.
p. 64, l. 34.
p. 64, l. 35 to p. 65, l. 24.
p. 73, ll. 33-40.
p. 80.
p. 81, l. 37.
p. 81, l. 42.

Dr. Shurley's evidence was taken on commission in Detroit. He did not produce his medical records, and he was not called as a witness at the trial, although living in Detroit, only a mile across the river from Windsor where the trial took place.

22. The Appellant's account of the alleged failing capacity of the Testator should be compared with the efforts which the Appellant made to induce the Testator to take decisive action in his favour as against the testator's brother, Franklin H. Walker, in 1912, when the Appellant was not re-engaged. The Appellant not only discussed the business of the Company with the testator, but wrote him two voluminous letters discussing the matter, including the financial results which the Appellant claimed were due to his services, in great detail, and the Appellant admits that he thought that the Testator had understood the subject.

p. 136, ll. 40-46.
p. 164, ll. 12-24 and ll. 42-45.
p. 165, ll. 40-43.
p. 166, ll. 33-36.
p. 169. ll. 40-45.
p. 172, ll. 34-47.
p. 173, ll. 1 and 34.
p. 176, ll. 19-20
p. 178, l. 10, *et seq.*

If the Testator's condition had been continuously as described by Dr. Dewar and Dr. Shurley, it would, of course, have been quite impossible for him to attend his office or communicate with the other witnesses called by the Respondent, as he did, and the Trial Judge and the Appellate Division, it is submitted, rightly refused to give effect to this evidence.

p. 181, l. 46.
p. 183, l. 11.
p. 191, ll. 2-12.

Exhibit 2, p. 615, *et seq.* Exhibits 8 and 9, pp. 102, 103. p. 91, ll. 6-14 and 30. p. 92, ll. 6 and 19 p. 265, ll. 25-45. p. 511, ll. 15-30. Exhibit 27, pp. 244, 245.

23. Owing to the death of Mr. Z. A. Lash, K.C., who drew the Will dated 27th February 1914, and of Mr. J. Harrington Walker, no evidence could be had of the instructions for the Will nor of the arrangements for execution, except the notes in Mr. Lash's handwriting (printed in the Record in red ink) which appear in pencil on the Will dated 21st December 1901 ; the letters from Mr. Lash to the Testator and the fact that Mr. Lash attended on one or two occasions for the purpose of drawing the Testator's Will and accompanied the Testator to his office, and the letter dated 22nd March 1915, written by Mr. Lash to the Testator's widow.

24. The Respondent called witnesses to prove :—

Exhibit 3, p. 626. p. 299, l. 20 to p. 300, l. 15. p. 300.

(A) That the Testator had replaced the executors named in the Will of 1901, and that in December 1913 he had instructed his local solicitor in Walkerville, Mr. J. H. Coburn, K.C., to prepare a further codicil revoking the legacy to the Appellant, and also certain other legacies, assigning as his reason that the circumstances had changed ; that the circumstances in connection with the other beneficiaries had, in fact, changed, viz. : one of them had died, others had been otherwise provided for, and that the Testator had then expressed the intention of making a new Will, the provisions of which he was considering ;

p. 91. ll. 6-14-30. p. 92, ll. 6 and 19. p. 265, ll. 25-45. p. 511, ll. 15-30. Exhibit 8, p. 102. Exhibit 9, p. 103.

(B) That the late Mr. Z. A. Lash, K.C., had gone to Walkerville stopped at the Testator's house, gone with him to the office, and that the subject of this consultation was the making of the new Will. A draft of a portion of the Will was sent forward with a letter dated 28th January, 1914, from Mr. Lash to the Testator, and the completed Will ready for execution was sent forward by letter from Mr. Lash to the Testator dated 16th February 1914 with instructions as to the method of execution ;

Exhibit 27, p. 244.

(C) A further letter (which was put in by the Appellant) from Mr. Lash to the Testator's widow, dated the 22nd March, 1915, after the death of the Testator, gave an account of the Testator's instructions with reference to the provision for the widow in the new Will ;

pp. 616-625.

(D) Mr. Lash's pencil notes (printed in the Record in red except the lines crossing out certain paragraphs which are printed in black) of instructions for some of the contemplated changes in the Testator's Will of 1901 appear on that document in Mr. Lash's handwriting ;

p. 635. p. 376. ll. 10-30. p. 398, l. 42 to p. 399, ll. 1-37.

(E) That the Will was executed by the Testator in the presence of J. H. McDougall and Robert J. Daniels, two old employees of the Distillery Company, who had been requested by the Testator's brother, Mr. J. Harrington Walker, to attend at the Testator's

residence for the purpose, neither of whom observed anything indicating any incapacity, though the proceedings were naturally formal;

(F) The signature of the Testator on the original Will should be observed. It is clear and well written, and it shows that the condition of the Testator when he signed it was very different from that which Dr. Shurley observed on any of the occasions when he saw him;

(G) It is evident that the Testator was at his office on the 2nd March 1914, the third day after the execution of the Will. A number of the Testator's cheques were produced some signed by his brother, J. Harrington Walker under Power of Attorney, some by the Testator himself. Mr. John A. McDougall says that the Testator signed his cheques at the office and cheques signed by the Testator himself from the 2nd to the 31st March 1914, were produced (packet marked "U," part of Exhibit 34). Exhibit 34 (not printed). p. 374, l. 25. p. 378, ll. 25 to 30 p 382, ll. 31 to 35

25. Notwithstanding the difficulty of recollecting specific instances of conversations with the Testator after the lapse of so long a time, particularly in view of the fact that no doubt as to the Testator's mental capacity apparently occurred to any of his business or social acquaintances in his lifetime, the Respondent was able to present the evidence of a considerable number of witnesses who had come in contact with the Testator on various occasions during the last few years of his life and who had observed no indication of mental incapacity. These included his widow, who also deposed to the circumstances of Mr. Lash's visits for the purpose of drawing the Will in question; Mr. J. H. Coburn, K.C., his local solicitor, who had received instructions in November 1913, to draw the codicil substituting National Trust Company Limited (the Respondent) for the Executors and Trustees named in the Will of 1901, and who also in December 1913 received instructions for, and drew a codicil providing for the cancellation of the legacy to the Appellant and certain other legacies which the Testator said that he was doing on account of change of circumstances, and to whom the Testator intimated that he was thinking of drawing a new Will. The Codicil was not found and there was no proof of its execution but a copy of the draft was produced by Mr. Coburn. Mr. Coburn also met him socially on other occasions before and after the making of the Will in question. p. 302, ll. 17-20. p. 303, ll. 40-43. pp. 311-312. p. 299, l. 25. p. 300, ll. 10-15. p. 299, l. 25. p. 310, ll. 20-42. p. 311.

26. Major General Brewster, a brother-in-law of the Testator's widow, had seen him almost every year and had spent the Christmas seasons of 1913–1914 and 1914–1915 as a guest of the Testator. He conversed with him on general topics and found no indications of failing mental capacity. "It never entered my head until this case came up." p. 480, l. 20-40. p. 481, ll. 20-45.

p. 315, l. 18. p. 316, l. 41. p. 318, l. 13. p. 316, l. 15. p. 317, ll. 1-34.

27. Mr. S. A. Griggs, a life-long friend of the Testator, who was provided for in both the Will of 1901 and the Will of 1914, but who would in consequence of a change in conditions have greatly benefitted by the establishment of the Will of 1901, and who had formerly been employed in an important position in the distillery company, used to see the Testator frequently up to the last of his life, said that while the Testator failed physically, and was perhaps not as active mentally, he (Mr. Griggs) yet felt that never at any time did the Testator not fully realize what he was doing and he would never act until he did realize it, and he would take time to consider any subject brought to his attention. He was deliberate in his talking but Mr. Griggs never noticed any confusion of speech.

p. 489, ll. 1-14. p. 489, l. 24. p. 492, l. 7.

28. Mr. Gari Melchers, an Artist, in whose works the Testator had taken a great interest for very many years, who was for very many years on terms of intimate friendship with him, and who saw him last in December, 1914, says that he never heard the Testator say an irrational thing; he was always quiet, never very effusive, he was always the same quiet, deliberate man.

p. 373, l. 40, and pp. 374, 375. p. 394, l. 4. p. 395, l. 13.

29. Mr. McDougall, the General Manager of Walker & Sons, one of the witnesses to the Will, had frequent conversations with the Testator in his later years in connection with his private books and accounts, and considered him capable of transacting business and making his Will.

pp. 338, 339. p. 339, l. 38. p. 340.

30. Mr. Ortved, the chemist of the Walker Company since 1906, referred to the Testator's interest in and understanding of the technical details involved in distilling a proposed new brand of whisky, which was one of the matters in connection with the Company's business in which the Testator had taken a personal interest, and which was at intervals down to 1913 the subject of practical discussion between them. The Testator was fully conversant with the method of converting the malt, etc. Mr. Ortved also mentions a conversation with the Testator with reference to one of his pictures in September 1914 on the last occasion when he saw him.

p. 334, l. 33. pp. 422-423.

31. Mr. Isaacs, Assistant Managing Director, remembers having occasion a few weeks before February 1913 to deal with a proposed change in the method of insurance, which was referred to the Testator because that was one of the subjects to which he had always given personal consideration in connection with the Company's affairs; and Mr. Cooper discussed insurance matters with the Testator in the summer of 1914.

p. 344, l. 41. p. 345, ll. 1-5. p. 347, l. 25.

32. Captain Lund, the representative of the Company in London, England, had met the Testator in the summer of 1913 and had found no change in his business capacity which had been very good indeed.

33. A number of other witnesses who had come in contact with the Testator as personal employees, referred to their impression of the Testator's capacity, and in some cases, to instances which they recollected, all tending to indicate that no doubt as to the mental capacity of the Testator had arisen during his lifetime.

34. Dr. Vedder of New York, had been consulted by the Testator at intervals from 1906 to October 1913 and particularly with regard to the alleged specific infection which had been suggested by Dr. Hoare. He had applied the recognized test for this purpose and had secured a negative result. Throughout his attendance, including 1913, when he last saw the Testator on his way through New York, he saw no signs of the alleged mental incapacity. p. 469, l. 31. p. 471, l. 12. p. 471, l. 25 to p. 472, l. 18

35. The Respondents called :

Dr. R. G. Armour, a practising physician experienced in the treatment of nervous diseases, who after having heard all the evidence except that of Dr. Beemer, who was the last witness called, said :—" I don't think that I " have heard any part of the evidence or the evidence as a whole which " would seem an adequate cause for declaring him incompetent to make a " Will." p. 530, ll. 9-11.

Dr. Nelson H. Beemer, who has been since 1894 Medical Superintendent of the Ontario Hospital for the Insane at Mimico, and who, after having heard all of the evidence, expressed the opinion that the Testator was competent to make and understand the Will of February 1914. p. 572, ll. 29-37.

36. If it were necessary to account for the change of the Testator's disposition towards the Appellant, there is abundant reason for this in the circumstances under which the Appellant parted with the Testator and his brothers in 1912.

37. It is evident that the Appellant had an exaggerated view of the value of his services and of his authority in the organization of the distillery company. His attitude towards the Testator's brother, Franklin H. Walker, evidently failed to take into account the fact that the latter was one of the employers of the Appellant. It is apparent that all three brothers were unwilling to part with an employee of such long standing as the Appellant, and whose services they all regarded as valuable, but his practice of discussing matters with the Testator and J. Harrington Walker before bringing them up at Directors' meetings in order that he might secure their support in advance in the event of any disagreement with Franklin H. Walker, was likely to result in friction, and the Appellant quite miscalculated the strength of his position when he expected, as he did, that the Testator and J. Harrington Walker would require Franklin H. Walker's withdrawal from the business. pp. 186, 187. pp. 148-149. p. 161, l. 10. p. 169, ll. 41-46.

38. In the negotiation, it appeared :—

p. 166, l. 10. (1) That the Testator himself had informed the Appellant that the Walkers had decided to offer him $20,000 upon his retirement. The Appellant having received as part of his compensation in earlier years 1,000 shares of the stock of the Company, which he had very shortly before considered to be worth $200 per share, demanded $400,000 to cover compensation in lieu of notice (to which, as his employment was renewed for a specific term, he was not entitled) and the price of his shares. When he began to find that his demands were being resisted, he resorted to threats, which it is true, were somewhat mysterious and vague, but perhaps all the more objectionable on that account ;

p. 146, l. 40. p. 149, ll. 18-20. p. 159, l. 15. p. 213, ll. 30-40. p. 159, ll. 40-46.

(2) In the course of his letter of the 16th August, 1912, addressed to the Testator, in which he complains of his situation, he says : " The only thing clear is that Mr. Frank wishes our relations to cease, and that you and Mr. Harry have been persuaded to consent " ; and later " But I am not writing this, dear Mr. Ed. to beg for anything. My object is a clear understanding . . . " ; and later, " Moreover, I want to assure you that if I am driven to any course which causes you discomfort, it will only be because I see no possible way of avoiding it, and it will be one of the great regrets of my life " ;

p. 175, l. 41.

p. 176, ll. 1-20. (3) The Appellant says in the course of his cross-examination that the course he contemplated was publicity, and he says that he thinks that the Testator understood that he was going to initiate a campaign of publicity ;

(4) Following this letter, dated 16th August 1912, there was a verbal interview between the Testator and the Appellant, in which the Testator had apparently suggested that the Appellant should put his ideas on the situation affecting himself in writing, and in a letter dated August 20th 1912, the Appellant proceeded to do this at great length, quoting a tabulated statement of the Company's profits. The Appellant's real opinion as to the Testator's capacity may be tested by the fact that he says that he thinks the Testator would have understood those figures, and that the Testator appeared to understand the intimation of a possible campaign of publicity which was mentioned at their interview.

p. 178, l. 10, *et seq.* p. 183, l. 12. p. 176, ll. 1-15.

39. A settlement was ultimately made by which the Appellant was paid $300,000 for his shares and all claims, instead of the $400,000 which he had originally demanded. Thereafter both the Appellant and the Testator were resident for several months in Walkerville, which is not a large place. They saw each other, but never spoke. The Appellant felt that he had been badly treated and that it was for the Testator to make the first advance. The Testator evidently did not feel impelled to do so, but held aloof, and they never spoke again.

p. 213, ll. 30-40. p. 222, ll. 10-12. p. 227.

UNDUE INFLUENCE.

40. It was admitted at the trial by Counsel for the Appellant that no direct evidence whatever of undue influence had been offered, and it is submitted that the Courts below have rightly rejected the suggestion that undue influence should be inferred. Mr. Franklin H. Walker was abroad and was not at Walkerville at any time while the new Will was under consideration. The only part which Mr. J. Harrington Walker appears to have taken was to request the two witnesses to come to the Testator's house to witness his brother's Will.

ADMISSION OF MRS. WALKER'S EVIDENCE.

41. The evidence of Mrs. Mary G. Walker, the Testator's widow, was taken on a commission issued by the Appellant. Acting upon the advice of her counsel, she declined to answer certain questions. The Appellant did not take any steps to compel her to answer them, which he might have done if her objection had been ill-founded.

The witness having been called upon a commission, according to the practice of the Supreme Court of Ontario, either party was at liberty to read her evidence, and the Judge permitted this Respondent to do so. His ruling was affirmed by the Appellate Division. In so far as the Trial Judge had a discretion in the matter, he exercised it in favour of admitting the evidence, and it is submitted that the ruling of the Appellate Division should be affirmed.

ADMISSION OF SO-CALLED OPINION EVIDENCE.

42. The Evidence Act, Revised Statutes of Ontario, Chapter 76 Section 10, is as follows :—

> "10. Where it is intended by any party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding, to be applied for before the examination of any of such witnesses.—9 Edw. VII, c. 43, s. 10."

43. The Appellant objected that the Trial Judge should not have permitted more than three witnesses to express an opinion upon the mental capacity of the Testator, and that the evidence of witnesses who had been in communication with the Testator, expressing their impression of the Testator's capacity, was within the Act.

44. It is submitted that these witnesses were not called to give opinion evidence within the meaning of the Act. They were asked to state the relevant facts observed by them, and their observations might properly

be expressed in qualified form stating the impression made upon their minds by what they had actually observed with reference to the Testator's appearance and communications.

45. The opinion evidence referred to in the Act is evidence of opinion as distinguished from observation of fact, and " according to the law and practice," it may be given only by persons who are qualified to express an opinion on the subject under consideration by reason of their experience, knowledge or study thereof. The Respondent called two such witnesses, viz. : Dr. Beemer and Dr. Armour, but none of the other witnesses called by the Respondent were called to give opinion evidence within the sense of the Statute.

46. The Respondent relies upon the reasons for decision of the Divisional Court in Rice *v.* Sockett (1912), 27 Ontario Law Reports, 410, and Wright *v.* Tatham (1838), 5 Cl. & F. 670 at page 720 *et seq.*

47. The Appellant applied for leave to read four affidavits in support of an application for a new trial on the ground of the alleged discovery of new evidence. The Appellate Division refused this application and refused to permit the filing and reading of these affidavits as part of the Record.
p. 597. Notice of this application was not given until the 5th November 1924,
p. 613, l. 13. the day when the argument of the appeal commenced.

Under the Consolidated Rules of Practice, Rule No. 232, the admission of new evidence upon an appeal is discretionary. The Rule is as follows :—

> " 232—(1) On all appeals, or hearings in the nature of appeals, and on all motions for a new trial, the Court or Judge appealed to shall have all the powers as to amendment and otherwise of the Court, Judge or officer appealed from, and full discretionary power to receive further evidence, either by affidavit, oral examination before the Court or Judge appealed to, or as may be directed.
>
> (2) Such further evidence may be given without special leave as to matters which have occurred after the date of the judgment, order or decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment at the trial, such further evidence (save as mentioned in sub-section (2)) shall be admitted on special grounds only, and not without leave of the Court, C.R. 498."

48. It was admitted by Counsel for the Appellant upon the argument that the alleged new evidence was merely corroborative of evidence already given, and the uniform practice of the Court is not to grant a new trial on the ground of discovery of new evidence which is only corroborative.

49. If the Appellate Division had permitted the affidavits to be filed the Respondents would have been afforded an opportunity of answering them, and would have been entitled to cross-examine.

DELAY.

Probate 11th September 1915. Action commenced 23rd June 1923.

50. The Appellant endeavoured to account for the delay in commencing his action by stating that he was not aware, until April 1922, of the provision which had been made for him by the Will of the 21st December 1901, but the Appellant was aware of the Testator's death from a newspaper cutting which had been sent to him. He had been asked to act as Executor when the Will was prepared, and thought that he would be appointed and that he would have been remembered in the Will. He had received a gossiping letter, dated 29th April 1917, from the witness Robinson, suggesting that the widow of the Testator was dissatisfied with the Will and had threatened to attack it and fall back on the Will of 1901 in which the Appellant was named as an Executor, but he made no enquiries for five years following the receipt of this letter. In the meantime Succession Duty and bequests under the Will of 27th January 1914 had been paid to the extent of $1,400,000, besides payments to the residuary legatees.

p. 142, l. 11. p. 230, ll. 35-46. p. 142, l. 25. Exhibit 29, p. 276, l. 30. p. 495, ll. 5-10.

51. The story in Robinson's letter was unfounded. In fact, the provision for the widow of the Testator in the Will of 1914 was very substantially greater than that in the Will of 1901. The widow was apparently dissatisfied with the provision which had been made for her, and this was subsequently supplemented by the Testator's brothers, but she denies that she had threatened to attack the Will of 1914, and it is submitted that her denial should be accepted, if for no other reason than that the provision for her in the Will of 1901 was somewhat less than half that which was made in the Will of 1914.

p. 516, ll. 33-45. p. 517, ll. 1-32.

After the Probate and before the commencement of this action Franklin H. Walker, J. Harrington Walker and Mr. Z. A. Lash, who would have been most material witnesses, had died.

52. The learned Trial Judge (Mowat, J.) reviewing the evidence, said :—

> " The result of this evidence pieced together, dovetailed together, combined and considered as a whole, does not make me think that there was anything which would affect the mind, or which would show the incapacity of the late E. C. Walker to make his Will when he did.
>
> " It is almost inconceivable that a practical man like General Andre Brewster, who has come up in the American Army and now

p. 589, l. 45.

arrived at the position of commanding the Corps of an area, which is a very large area, who was, therefore, to be trusted by his superiors, who frequently met E. C. Walker, and states that he was a man of rational mind, is not to be believed, as it is quite obvious that he is telling the truth. General Brewster is a brother-in-law, and says that the suggestion made now, that the man in whose house he has stayed on many occasions was a man of mental incapacity is very puzzling to him—or he used words to that effect. General Brewster saw E. C. Walker, rode with him, walked with him, stayed in his house, and had that intimacy which would bring to his mind any defects such as mentioned. And there are other witnesses of the same kind. It is true that the witnesses differ in small regard as to the existence of that aphasic condition which made Mr. Walker at times stop in the middle of a sentence, or use the wrong word, or be so deliberate as to almost think he was incapable of speech. I do not place any importance upon that. It is true that this aphasic or aphemic condition existed at times, I think ten times in two years, as is said by his own physician Dr. Hoare, who does not say that the effect of that aphasic or aphemic condition would incapacitate him from making his Will when he knew him and during his treatment in 1907."

53. The learned Trial Judge, referring to the issue of undue influence said :—

p. 591, l. 1. " Mr. McCarthy, leading counsel for the plaintiff, in opening his address frankly and candidly said, as an eminent and experienced counsel would do, that he had no direct evidence of undue influence, and he could only argue that from the exterior facts . . . Then the

p. 591, l. 30 Will arrives, and Mr. Walker is expecting it, and gets his brother J. Harrington Walker to have witnesses brought. We do not know if the names of the two witnesses, Mr. McDougall and Mr. Daniels, were mentioned, but it is highly likely that he did because they are men he knew, and were men who would be there if the Will had to be proved. Mr. McDougall and Mr. Daniels go up to Mr. Walker's home, and he is there apparently to have his Will signed in their presence, with the usual formality to make the document complete.

" Now the suggestion has been made that because Mr. J. Harrington Walker got these two witnesses to attend, therefore he was interested in the making of the Will, and making the changes that were made. That is a wild suggestion, and I cannot accept such a suggestion for a moment. This was done in the ordinary course of business, and there is no suggestion that these brothers influenced this man at all ; there is no evidence that his wife influenced him, although that was the suggestion at the early part of the trial."

54. The learned Trial Judge, commenting on the delay in commencing the action, said :—

" The onus not having been displaced, that this former employee p. 594, l. 22.
after nine years of inaction should be allowed to be put in a position to benefit by the former Will, on the evidence which has been adduced here, would not be doing justice. The plaintiff knew that he had been appointed Executor under the first Will, and, as a business man, it must have struck him as peculiar that he had not heard of the requirement to do his duty when he heard of the death of the late E. C. Walker which took place in 1915. The letter of Mr. Robinson was written not long afterwards, and Mr. Robins must have heard about the death. As Executor, he would write a letter saying ' I was told I was made Executor of Ed. Walker's Will made in 1901 ; now what am I to do ? ' He does nothing until after a lapse of eight or nine years, when he comes from England, having heard that he met with this reverse ; and now attempts to break the Will of a gentleman of this character, on the evidence which he has given. That is not sufficient."

55. The judgment of the Second Divisional Court was delivered by Orde, J. A., with whom Latchford, C. J., Middleton, J. A., and Masten, J. A., agreed.

After reviewing the evidence, the learned Judge said :—

" Now, here is a Will prepared after instructions given during p. 607, l. 35.
the course of a whole day's personal contact with the Testator both in his office and at breakfast and dinner and afterwards in his home, by a gentleman who in his lifetime ranked among the leaders of the Bar, who had for some years been Deputy Minister of Justice at Ottawa, and who was considered one of the ablest and soundest solicitors in Canada, and executed so far as the attesting witnesses were concerned, by one who appeared to know what he was doing. That the Will was not read over or discussed in the presence of the two witnesses is of no consequence. It would have been most unusual for a wealthy man either to read aloud, or to have read to him, or even to discuss a long Will containing many provisions of an intimate and private nature, in the presence of two of his own employees. Eight years after the Testator's death this Will is attacked on the ground that the Testator was not mentally competent to make a Will at the date of its execution. This attack involves the implication either that Mr. Lash spent a whole day with, and received instructions, from a man who was not aware of what he was doing, or that he was in some direct or indirect way a party to a fraud upon the Testator in drawing and procuring the execution of a Will which did not in fact embody the Testator's wishes, assuming

him to have been capable of expressing them. In the circumstances the plaintiff's task would appear to be well nigh hopeless, but he undertakes it with an energy and determination worthy of a better cause."

56. Commenting upon the evidence called by the Appellant, the learned Judge says :—

p. 608, l. 9. "What is the evidence on which the plaintiff relies ? Three physicians are called by the plaintiff, Dr. C. W. Hoare, Dr. P. A. Dewar, and Dr. Burt R. Shurly. The Testator had not been in good health for many years, he was never a robust man, and there is no doubt that during the late years of his life he was suffering from arteriosclerosis, from some bowel trouble, and at times from aphasia. Dr. Hoare had attended him between the years 1891 and 1907. He says there was at times a good deal of confusion in his mental condition, and that there was ' slightly progressive degeneration of the mental faculties and nervous system,' and yet during the period covered by Dr. Hoare's visits the Testator was attending to his ordinary business, except during the ' periods of disability,' as Dr. Hoare terms them.

"Dr. Dewar attended the Testator between 1910 and 1913. He says he was called in frequently and that he probably saw Mr. Walker at his worst times. On these occasions he talked with some difficulty, there was some confusion of ideas, and he had some difficulty in walking. He says, speaking of Mr. Walker's condition in 1913, that ' any time I saw Mr. Walker I would have no hesitation in saying I would not think he would be capable of making that Will (i.e. the 1914 Will) himself. He could not instigate the thing or carry it through. He might understand a simple Will when it was put in very plain language to him, and he was given plenty of time to think.' But Dr. Dewar admits that on one occasion he was surprised to find the Testator talking intelligently about some matters. And as he saw the Testator only at his worst he is forced to admit that his conclusions as to the Testator's mental powers are based upon inferences from his tendency to get confused in his conversation when he, Dr. Dewar, was called in to see him. The value of the conclusions so drawn may be tested by his statement that from what he saw he would not expect the Testator to have been able to give weight and consideration to any important business deal late in 1912.

"In the teeth of these conclusions of Dr. Dewar's we have the evidence afforded by the correspondence between the Plaintiff on the one hand and the Testator and Mr. Lash on the other, during the summer of 1912, to which fuller reference is made later. How can Dr. Dewar's opinion be reconciled with the overwhelming evidence

afforded by the existence of these voluminous letters written by the Plaintiff himself and containing not the slightest suggestion of mental incapacity or impairment in Edward Walker, but rather that he was still one of the dominating factors in the management of the Company ?

" Dr. Shurly, of Detroit, first began his attendance in November, 1913. His evidence, if it stood alone, would undoubtedly create the impression that during this period the Testator was wholly lacking in mentality. He describes the Testator as a ' vegetable ' and as like a child, but he admits on cross-examination that the Testator may have had his good days, and there is so much of this physician's opinion that is plainly contradicted by the facts that its value is completely destroyed. It is utterly inconceivable that Mr. Lash and Mr. Coburn could have had such prolonged interviews and received instructions from a man in the hopeless mental condition which Dr. Shurly describes.

" In the face of Mrs. Walker's evidence as to her husband's mental and physical condition during the period in question, of the evidence of the two witnesses to the Will as to the Testator's condition the day he signed it, and of the physicians called by the Defendants, of the fact that he went to and from his office on the day of Mr. Lash's visit and spent hours of that day with Mr. Lash, of Mr. Coburn's evidence as to his condition when giving instructions for the November and December codicils, and of many other pieces of evidence as to the Testator's ability to transact business during the period when the Will was in preparation and was executed, can the Court possibly hold that the Plaintiff has made out the case he set himself to establish ? The signature to the Will itself gives no indication of having been appended by a ' vegetable ' and is as well written as that in the 1901 Will."

57. Referring to the Appellant's allegation to the effect that the Will was prepared under suspicious circumstances, the learned Judge said :—

" The Plaintiff has failed to show such suspicious circumstances as would justify the Court in holding that the Will should not be sustained." p. 611, l. 2.

58. Referring to the construction of the Evidence Act, the learned Judge said :—

" To bring the matter home to the present case, do the two witnesses to the execution of the Will come within the category because they were asked as to the Testator's mental condition when he signed the Will ? I cannot think so. They merely tell what they saw or failed to see. Their statements as to what they saw or failed p. 611, l. 33

to see are not predicated upon any peculiar knowledge or experience differing from that of mankind in general. I think the Plaintiff has failed to establish that there was any infringement by the learned Trial Judge of the provisions of Section 10."

59. Referring to the evidence of Mrs. Walker taken on commission the learned Judge said :—

p. 612, l. 24: "The matter may have been largely in the discretion of the Trial Judge. The evidence was adduced by the Plaintiff, and it is difficult to see upon what ground he can object to its admission on behalf of a defendant other than Mrs. Walker, merely because the witness whom the Plaintiff chose to call failed to come up to his expectations. No substantial reason has been advanced for granting a new trial upon this ground."

60. Referring to the application based on the discovery of fresh evidence, the learned Judge said :—

p. 612, l. 31. "The third is that fresh evidence has been discovered since the trial which it is suggested may assist the Plaintiff. Whatever this evidence may be, it is admittedly merely corroborative at most of evidence already given on behalf of the Plaintiff. The practice is clear that a new trial cannot be granted upon that ground."

This Respondent submits that the appeal of the Appellant should be dismissed for the following

REASONS.

(1) Because the findings of the Trial Judge upon the facts as to the capacity of the Testator and the absence of undue influence, confirmed by the Appellate Division, are right and should not be disturbed.

(2) Because the Appellant failed to prove that the Testator was of unsound mind, or that the Will of 1914 was procured by undue influence, or that there were any circumstances of suspicion surrounding the preparation and execution of the said Will.

(3) Because the evidence showed that the Testator was of sound mind and duly made the Will dated 27th February 1914.

(4) Because the reasons for judgment of the learned Trial Judge and of the learned Judges in the Appellate Division are right.

(5) Because the action was not commenced until many years after the Probate of the Testator's Will and until after the death of the witnesses who could have given the most direct evidence as to the preparation and execution thereof.

(6) Because the Appellant's objection to the admission of the evidence of the Testator's widow was unfounded.

(7) Because even if the evidence of the Testator's widow was not rightly admitted, the Appellant nevertheless had failed to prove the essential allegations in his pleadings.

(8) Because the Appellate Division exercised its discretion in refusing to admit the affidavits alleging the discovery of new evidence, and this discretion should not be overruled.

(9) Because no special circumstances were shown justifying the admission of new evidence.

(10) Because the alleged newly discovered evidence was admitted to be merely corroborative of other evidence adduced at the trial.

GLYN OSLER.

J. H. RODD.

H. C. WALKER.

In the Privy Council.

No. 122 of 1925.

On Appeal from the Supreme Court of Ontario (Appellate Division).

BETWEEN

WILLIAM ROBINS (*Plaintiff*) - - - *Appellant*

AND

NATIONAL TRUST COMPANY LIMITED and Others (*Defendants*) - *Respondents.*

CASE OF THE RESPONDENT NATIONAL TRUST COMPANY LIMITED.

BLAKE & REDDEN,
17 Victoria Street, S.W.1.